Supreme Court, U.S.
FILED
JUN 24 1971

~~NO. 1741~~

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

70-199

GENE BALL,
Petitioner

v.

BOARD OF TRUSTEES OF THE
KERRVILLE INDEPENDENT SCHOOL DISTRICT,
HENRY H. WIED, MARGARET WATSON,
DAN W. BACON, PAT BRADEN,
EARL A. COCHRANE, MAURICE HAUFLER
AND C. H. BORCHERS, MEMBERS OF THE
BOARD OF TRUSTEES, INDIVIDUALLY
AND IN THEIR OFFICIAL CAPACITIES,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The respondents, Board of Trustees of the Kerrville Independent School District, Henry H. Wied, Margaret Watson, Dan W. Bacon, Pat Braden, Earl A. Cochrane, Maurice Haufler and C. H. Borchers, members of the Board of Trustees, individually and in their official capacities, pray that the petition of petitioner, Gene Ball, that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in this case, be denied.

OPINIONS BELOW

The opinions below are correctly set forth in Appendix A and B of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit; however, respondents have added the opinion and decision of Dr. J. W. Edgar, Commissioner of Education of the State of Texas, dated December 11, 1969, shown in Appendix A to this respondents' opposition brief at page A-1.

JURISDICTION

Respondents do not contest jurisdiction of this Court.

QUESTIONS PRESENTED

Did the United States Court of Appeals for the Fifth Circuit err in affirming the judgment of the United States District Court in dismissing petitioner's [Gene Ball's] cause of action, if any he may have, without prejudice, however, to Gene Ball's right to petition the court for reinstatement of such cause to consider any federal claims remaining after completion of the administrative proceedings pending in the State Court, provided such administrative proceedings are completed by Gene Ball in a good faith adversary manner?

Respondents, hereinafter referred to as 'School District,' are dissatisfied with petitioner's statement of the question presented.

STATEMENT OF THE FACTS

The School District has never had opportunity to present testimony on the competency of petitioner as a teacher. The matter of his competency is not in issue before this Honorable Court, and for the purpose of this appeal is immaterial.

Petitioner's contract was not terminated until September 23, 1969, after lengthy hearings, including an open public hearing on September 15, 1969.

Although not in issue before this Honorable Court, but for the purposes of this appeal from the Order of Dismissal, and without a full hearing on the merits, the reasons for such termination of petitioner's teaching contract are more fairly and accurately set forth by Dr. J. W. Edgar, Commissioner of Education of the State of Texas, in the Commissioner's Statement of Case and Decision dated December 11, 1969, and shown in Appendix A, at page A-1, in this respondents' brief in opposition to petitioner's petition for writ of certiorari.

The School District cannot agree with petitioner's presentation of the Statement of Facts because it is infiltrated and surrounded by petitioner's arguments and authorities cited. The School District would respectfully submit the following as the Statement of Facts.

1. That during the summer months of the year 1969, when school was not in session, petitioner allowed his hair to grow long and he grew a beard and mustache. During the summer months of other years when school was not in session, petitioner had grown a beard and mustache, but had each year always, except for the year 1969, shaved off his beard and mustache prior to the beginning of the school year. Petitioner was aware of the School District's rule, regulation and policy that all male teachers were to be clean shaven, except that neatly groomed, closely trimmed mustaches would be permitted, and he had complied with such rules, regulations and policies for all years prior to the year 1969.

2. That prior to the general faculty meeting held before the commencement of the school year 1969-1970, the

superintendent and the principal of Tivy High School, the school to which petitioner was assigned as a math teacher, were contacted by many citizens concerning the appearance of petitioner, and requests by several citizens of the school district were made that their children not be assigned to the class where petitioner would be assigned to teach.

3. That at the general faculty meeting of said school district held on the 29th day of August, 1969, the petitioner attended said meeting wearing a beard and mustache and the appearance of petitioner at such meeting had a disruptive effect on the meeting. In the afternoon of August 29, 1969, the superintendent of said school district had a conference with petitioner concerning the whole problem and requested that petitioner shave, and that the whole matter would be at an end. Petitioner refused, whereupon the superintendent, in the furtherance of the fulfillment of school policy, the educational purpose and the best interest of the school district, advised petitioner that he was suspended until September 2, 1969, to consider the request.

4. That on the opening day of the school year 1969-1970, the same being September 2, 1969, petitioner appeared at Tivy High School wearing the said beard and mustache and was informed by the high school principal that he was suspended from teaching math classes in the school. Petitioner would not accept said suspension except after the time he was officially on the job and in the presence of witnesses; therefore, after 8:00 o'clock A. M., the said principal had to take two faculty members of said high school away from their teaching duties on opening day of school to go to the room where petitioner was in order to inform him of such suspension. Shortly thereafter, petitioner again had a conference with the superintendent of said school district and petitioner was advised that if he would shave off his beard he could return to his classes. Petitioner refused to comply with such school rule,

regulation and policy and such request. The superintendent suspended petitioner from further teaching and advised petitioner that he would recommend to the Board of Trustees of said school district that petitioner's contract be terminated and that the same could be averted if petitioner chose to comply with such reasonable request.

5. Petitioner was duly notified that a meeting of the Board of Trustees of said school district was called for 5:00 o'clock P. M. on September 3, 1969, to consider the termination of his contract, and petitioner was invited to attend such meeting in person and with counsel, if he desired. Petitioner advised the school district that he did not choose to attend, but might elect to appear at a later date. The superintendent of the school district recommended to the Board of Trustees that petitioner's contract for the school year 1969-1970 be terminated for the reasons that petitioner was uncooperative, insubordinate, disruptive, disturbing, having a retarding effect on teaching and learning, failing to promote decorum, dignity, and proper atmosphere, violating the terms and spirit of his contract, and that the request was a reasonable request under existing administrative policy. Further, such request was being made to advance the best interest of the school and its students and faculty. The matter was discussed at length by the said Board of Trustees, including the matter of petitioner's agreement to be governed by the rules, regulations and policy of the school district, the superintendent of schools and the principal, and the matter of petitioner's agreement to teach to the best of his skill and ability. Also discussed was the matter of distraction from petitioner's ability to teach under the circumstances, and of primary importance, the effect of the learning of the students, the problem of enforcing discipline and the challenge to school authority and its effect on the students and the school as a whole, as well as the adverse effects which distract from the purpose of education. After having considered all of said matters, in the best interest of said school district and in the light of the duties imposed upon the Board of Trustees of said

school district for the furtherance of purposes of education, the Board of Trustees voted unanimously to terminate the contract of petitioner. It was understood, however, that if petitioner wanted to be heard on the matter, he would have a hearing upon his request.

6. That subsequent to said meeting of the Board of Trustees of the Kerrville Independent School District held on the 3rd day of September, 1969, petitioner requested that he be granted a further hearing on said matter. That on the 15th day of September, 1969, the Board of Trustees did hold a rehearing on the matter of the termination of such contract of petitioner, which meeting was an open public meeting wherein the Board of Trustees of the school district heard lengthy evidence, testimony and opinions from the numerous persons in attendance. Petitioner was present in person and represented by counsel and they, as well as any other person desiring to give evidence and testimony and express an opinion, were all fully heard at length. Petitioner and his counsel were given full opportunity to cross-examine any witness. Further, petitioner through his attorney, presented argument and cited authorities to the Board of Trustees. Said Board of Trustees reheard such matter in its entirety and reconsidered the same afresh with an open mind, and, further, said Board of Trustees did not act hastily, but deferred making a ruling to a later date after having had an opportunity to study the matter in depth.

7. That on the 23rd day of September, 1969, the Board of Trustees of the school district met again and further discussed and considered the entire matter relating to the termination of petitioner's contract. It was the opinion of such Board of Trustees, after having heard and reheard, considered and reconsidered, all matters in connection with the termination of petitioner's contract, that petitioner's contract should [redacted]inated for all or any one or more of the reasons given in the recommendation of the superintendent of schools. Further, the Board of Trustees found that such ruling is reasonable, necessary

and for the best interests of the school district and that the same is not being applied in an arbitrary or capricious manner. By a unanimous vote of all seven of the members of the Board of Trustees, it was decided that petitioner's contract should be terminated for the best interests of the school district.

In further action of said Board of Trustees at such meeting, it was resolved that the school district pay to petitioner a sum of money which would be equal to his normal September salary had he been employed by the school district, for the reason that the Board of Trustees desired to deal with petitioner in the utmost fairness during the time required to consider the entire matter anew and reach its decision as aforesaid that the decision of the Board of Trustees of the school district set forth in the minutes of such board meeting dated September 3, 1969, stand unaltered for the best interests of the school district.

8. Petitioner appealed from the decision of the Board of Trustees which terminated his contract for the school year 1969-1970 to Dr. J. W. Edgar, Commissioner of Education of the State of Texas, and a hearing on said appeal was had in the Conference Room of the Texas Education Agency Building in Austin, Travis County, Texas, before the said State Commissioner of Education on the 19th day of November, 1969, at which time both the petitioner and School District introduced their testimony relating to the aforesaid matters in controversy between them, and a transcript was made of the same. Also, both parties were represented by counsel and citation of many authorities was presented to said State Commissioner of Education. That on the 11th day of December, 1969, Dr. J. W. Edgar, State Commissioner of Education, handed down his opinion and decision, a copy of which is set forth in Appendix A, page A-1 to this respondents' brief in opposition to petitioner's petition for writ of certiorari.

9. The opinion and decision of the State Commissioner of Education handed down on December 11, 1969, having

been adverse to petitioner, an appeal was taken by petitioner to the State Board of Education of the State of Texas. At a public meeting of the State Board of Education held on January 5, 1970, in Austin, Texas, the State Board of Education, by a vote of eight (8) to seven (7) reversed the decision of the State Commissioner of Education. Some uncertainty existed as to exactly what the State Board of Education had actually ordered because of certain statements and announcements made by members of the State Board of Education at said public hearing; therefore, a copy of the minutes or the written order as actually entered by said Board of Education was requested. On February 13, 1970, a true and correct copy of excerpts appearing in the Minutes of the State Board of Education for January 5, 1970, was prepared by the State Commissioner of Education and forwarded to the attorneys for petitioner and School District.

10. The decision of the State Board of Education having been adverse to the Board of Trustees, an appeal was taken by the School District to the District Court of Kerr County, Texas. Said appeal by the School District was filed on February 19, 1970, the same being Cause No. 6405, in a suit styled Gene Ball vs. Kerrville Independent School District, in the District Court of Kerr County, Texas, Second 38th Judicial District, and service of citation was had on Gene Ball on the 20th day of February, 1970.

11. On February 27, 1970, petitioner filed suit in the United States District Court for the Western District of Texas, San Antonio Division, to declare that the School District could not terminate his teaching contract for the 1969-1970 school year or refuse to award him renewal contracts for subsequent years; for a preliminary injunction, and upon final hearing, a permanent injunction directing the School District to reinstate petitioner as a teacher and to refrain from refusing petitioner a new contract for subsequent years; for damages, attorney's fees and costs.

12. After a hearing had on March 20, 1970, before the United States District Court, the court denied petitioner's motion for a temporary injunction and ordered a hearing on the merits of the cause immediately after completion of the administrative proceedings now pending in the Second 38th Judicial District Court of Kerr County, Texas. (Copy of the Order of the United States District Court is shown on page B-1 in Appendix B to petitioner's petition for writ of certiorari.)

13. Shortly after March 20, 1970, the Judge of the Second 38th Judicial District Court of Kerr County, Texas, set the date of the trial on the merits of the administrative proceedings then pending in said State Court for May 20, 1970, but, at the instance of petitioner, it was continued. Petitioner, through his attorney, requested that the administrative proceedings now pending in the State Court not be set for trial pending appeal and until he requested a setting of the cause for trial. The State District Court is ready to afford a prompt hearing of said proceedings whenever petitioner is ready to proceed to trial. This is an important fact bearing upon the issue of the adequacy of the State administrative remedy. It is also important because of the bearing it has upon the record petitioner has created and then about which he complains.

14. The School District has no disagreement with the synopsis of events occurring from April 2, 1970 through May 4, 1971 set forth in petitioner's petition for writ of certiorari, including all applicable orders and judgments set forth in Appendix A and B to his petition.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The School District's action of appeal to the District Court of Kerr County, Texas, is a part of the administrative process and the remedy by way of appeal to such State Court is an administrative one. The fact that in the State Court the School District is attacking the jurisdiction of the State Board of Education to make its ruling and asking for a trial de novo,

among other things, certainly does not alter the fact that the School District is also pursuing the administrative process and the remedy by way of appeal to such State Court. The fact, that at the same time and in the same State Court action where the School District, in following and pursuing a part of the administrative process, is also attacking the jurisdiction of the State Board of Education and asking for other matters, does not destroy or take away from the fact that the School District is perfecting and pursuing its administrative remedy of right to appeal to the district court of the county in which such school district lies on the ground that the decision of the said State Board is not supported in the record; is arbitrary and capricious, and is in error in the application of existing law to the facts of the case.

The mere fact that the remedy available to the School District after the State Board of Education made its decision is before the State District Court does not make it a judicial action, at least insofar as the School District's appeal from said adverse decision is concerned, for such appeal is but a part of the administrative process which first should be exhausted.

In 1 Barron and Holtzoff, Section 65, Exhaustion of Other Remedies, at page 355, such treatises have this to say on such point:

> In theory it is only administrative remedies which need be exhausted, and there is no requirement to exhaust a state judicial remedy before coming to federal court. However the mere fact that a remedy is available before a court does not make it judicial for purposes of this test. If the state court action is a part of the administrative process, the remedy is an administrative one and must be exhausted. Though the decisions are far from clear as to when a state court action is 'judicial' and when 'administrative', emphasis has been laid on whether the state court may substitute its 'legislative' order or regulation for that of the administrative agency.

In support thereof, on page 355, the following cases are cited among others:

Prentis v. Atlantic Coast Line Co., 1908, 29 S. Ct. 67, 211 U.S. 210, 53 L. Ed. 150.

Gilchrist v. Interborough Rapid Transit Co., 1929, 49 S. Ct. 282, 279 U.S. 159, 73 L. Ed. 652.

Baron v. O'Sullivan, C.A. 3d, 1958, 258 F. 2d 336.

Texas Education Code, Section 21.215 Appeals, in part reads as follows:

> (c) Either party to an appeal to the commissioner shall have the right to appeal from his decision to the State Board of Education, according to the procedures prescribed by the State Board of Education. The decision of the State Board of Education shall be final on all questions of fact, but shall be subject to appeal to the district court of any county in which such school district or portion thereof lies, if the decision of the State Board:
>
> (1) is not supported in the record by substantial evidence;
>
> (2) is arbitrary or capricious; or
>
> (3) is in error in the application of existing law to the facts of the case.
>
> (d) Trial procedure in the district court shall be the same as that accorded other civil cases on the docket of said court, with the decision of the trial court to be subject to the same rights of appeal under the Texas Rules of Civil Procedure as is accorded other civil cases so tried.

The following annotation and case are cited in the annotations in 42 U.S.C.A. following Section 1983:

> Federal jurisdiction should not be available under

guise of due process to every potential litigant who claims to have been wrongfully discharged from employment, where state administrative remedies are adequate. Bradford v. School Dist., No. 20, Charleston, S. C., D.C. S.C. 1965, 244 F.Supp. 768, affirmed 364 F. 2 d 185.

Petitioner commenced his alleged complaint under the administrative process available to him under the laws of the State of Texas, and at this point in such administrative proceeding, petitioner has a decision favorable to him. Such administrative remedy provided under the laws of the State of Texas is an adequate remedy, and petitioner is certainly in no position to complain about the adequacy of the remedy he selected or to complain about the result, which at this point is favorable to him. It is respectfully submitted that petitioner is estopped to complain about the remedy under the Texas administrative process which he initiated.

Petitioner's pleadings in connection with the adequacy of relief consist of conclusions wholly unsupported by any allegations of acts or facts upon which such conclusions could be based, except the record which he may have created for himself.

In petitioner's petition for writ of certiorari, on page 12, he states 'that no state remedy, either adequate or otherwise, is provided by the State of Texas which could even arguably support Mr. Ball's asserted right to re-instatement next year or his damaged claims (except back pay for his 1969-1970 teaching year) against the defendants.'

Such statement is exactly contrary to the conclusions of law found by District Judge Noel in the case of Bonner v. Texas City Independent School District, 305 F.Supp. 600 (D.C. S.D. Tex. 1969) where, at page 618, the court said:

> The State of Texas has provided a procedure for administrative review of cases like this one. [Action by teacher for injunction to require school district to offer teaching contract.] Tex. Rev. Civ. Stat. Ann. Art. 2654-7 Section 1 (1965).

Art. 2654-7 Section 1, V.T.C.S. has been carried forward into the Texas Education Code in Section 11.13(a) which reads as follows:

> Persons having any matter of dispute among them arising under the school laws of Texas or any person aggrieved by the school laws of Texas or by actions or decisions of any board of trustees or board of education may appeal in writing to the commissioner of education, who, after due notice to the parties interested, shall hold a hearing and render a decision without cost to the parties involved, but nothing contained in this section shall deprive any party of any legal remedy.

The School District has also found no Texas case closer on point than the case of Ramos v. Guerra, 311 S.W. 2d 869 (Tex. Civ. App. 1958) N.W.H., where an injunction was granted reinstating a teacher who held a valid teacher's contract.

However, important public policy considerations of the State of Texas concerning education are involved in the matter of the length or duration of a teacher's contract.

In Fromen v. Goose Creek Independent School District, 148 S.W. 2d 460 (Tex. Civ. App. 1941, error dismd, judgment correct), a 'tenure plan' adopted by the school district was held void on two grounds: First as being opposed to Article 2781, V.T.C.S. (the predecessor to Section 23.28, Texas Education Code) specifying the length of terms for which teachers may be employed by school districts, and, second as being opposed to the public policy of the State of Texas.

That in addition to the allegations of federal questions raised by petitioner, there are questions of state law and public policy.

According to 1 Barron and Holtzoff, Section 64, Abstention From the Exercise of Jurisdiction, at page 340, the treatises state that the case of Railroad Commission of Texas v. Pullman Co., 1941, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971, if not the first, is surely the leading case for the entire abstention doctrine.

The abstention doctrine has been applied even where plaintiff

is claiming a denial of his civil rights; however, it is pointed out on page 342 of 1 Barron and Holtzoff that in the lower courts, at least, there has been some reluctance to apply the doctrine as rigorously in civil rights cases. One case, among others, cited at page 342 of 1 Barron and Holtzoff is the following annotation:

> Where South Carolina statute requiring Negro school teachers, as condition of employment, to submit sworn statements concerning membership in N.A.A.C.P., and prohibiting employment of teachers who were members, had not yet been construed by State Court, three judge federal district court would stay action by Negro school teachers for determination of its constitutionality until such State Court construction, even though statute was clear, and though stay order would involve delay, inconvenience and cost to parties. Bryan v. Austin, D.C. S.C. 1957, 148 F. Supp. 563, vacated as moot 77 S.Ct. 1396, 354 U.S. 933, 1 L. Ed 2d 1527.

Petitioner selected his forum under the administrative process accorded to him under the laws of the State of Texas several months prior to the filing of his suit in the United States District Court.

Petitioner elected to bypass his opportunity of proceeding directly to the United States District Court with his alleged federal claims. Instead, he voluntarily and of his own volition submitted his challenge on the same alleged federal claims to state administrative action. Having initially selected the remedy of administrative review as provided under the laws of the State of Texas, petitioner is now estopped to claim such remedy is not adequate, and he has waived his right, if any he ever had, to forsake such administrative review.

In the absence of some compelling reason and in the absence of a strong showing on the part of petitioner that the administrative remedy which he chose and launched is inadequate, he has waived his right, if any he may have, at this point in time while mid-stream of the administrative process, to forsake such remedy. Petitioner should not be permitted to flee

at whim to another forum and should be estopped from so doing.

In 1 Barron and Holtzoff, Section 65, Exhaustion of Other Remedies, page 353, it is reported that:

> In a leading case the Supreme Court spoke of 'the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'

and in support of such statement the work cites the case of Myers v. Bethlehem Shipbuilding Corporation, 1938, 58 S.Ct. 459, 463, 303 U.S. 41, 50-51, 82 L. Ed. 638.

Additional cases are cited in the pocket part to 1 Barron and Holtzoff, page 289 (pocket part) to support such proposition of exhaustion of other remedies. One is:

> Availability of adequate administrative remedy precludes granting of injunctive or declaratory relief. Caribbean Atlantic Airlines, Inc. v. Leeward Islands Air Transport, C.F. Puerto Rico 1967, 269 F. Supp. 231.

Another case is cited at page 292 (pocket part) of 1 Barron and Holtzoff to support such proposition, which annotation follows:

> Issues posed in action by airlines for judgment declaring that New York State Commission for Human Rights was without jurisdiction to apply age discrimination provisions of New York Law Against Discrimination to airlines' stewardesses engaged in flights in interstate and foreign commerce were not ripe for judicial review where there was considerable doubt that airlines would be subjected to New York statutory provisions, airlines had not taken advantage of opportunity to adduce proof in support of their objections before state authorities, and there was no showing of palpably unconstitutional exercise of authority threatening airlines with irreparable injury.

Allegheny Airlines, Inc. v. Fowler, D.C. N.Y. 1966, 261 F. Supp. 508.

Petitioner has voluntarily submitted all matters, including his federal claims, in the administrative procedures of the State of Texas. On September 15, 1969, he submitted his federal claims to the Board of Trustees of the School District. On November 19, 1969, he submitted his federal claims to Dr. J. W. Edgar, Commissioner of Education of the State of Texas. (See Appendix A hereto attached.) On January 5, 1970, petitioner again submitted his federal claims, this time to the State Board of Education, and received a decision favorable to him. Only after the hearing before the United States District Court on March 20, 1970, did petitioner first attempt to remove his federal claims from the administrative proceedings. That was when the matter was already pending, on appeal, in the Second 38th Judicial District Court of Kerr County, Texas.

Petitioner first commenced action, including the assertion of all of his federal claims, under the State of Texas administrative remedy procedure and then, thereafter, came to the federal court. Petitioner was not unwillingly sent to the State of Texas remedies under any federal order, decision, rule or procedure; but, on the contrary, petitioner commenced state action asserting all of his federal claims, then came to federal court. This is a maneuver sharply disapproved by the Supreme Court (Sweet Briar Institution v. Button, 280 F. Supp. 312, D.C. W.D. Va. [1967] at pages 315-316.) Beginning at page 466, the Supreme Court, in disapproving such maneuver in the case of England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964) said:

> But we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries. We implicitly rejected such a rule

> in Button, when we stated that a party elects to forgo his right to return to the District Court by a decision to 'seek a complete and final adjudication of his rights in the state courts.' We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then–whether or not he seeks direct review of the state decision in the Court–he has elected to forgo his right to return to the District Court.

In light of the facts of this case, especially the submission by petitioner of all his federal claims to state administrative action, it is respectfully submitted that this Honorable Court should not permit such a maneuver. In support thereof, School District would respectfully show that in the case of Frazier v. East Baton Rouge Parish School Board, 363 F. 2d 861 (5th Cir. 1966), at page 862, the Court said:

> In these circumstances, once Frazier submitted his challenge to state administrative action to state judicial review, the only appropriate federal forum for review of his alleged federal claim of discrimination was the United States Supreme Court. He bypassed that opportunity. The district court therefore correctly determined it had no jurisdiction.

In another case of the 5th Circuit, it was held that with litigation pending in the State Court, no review by the United States Supreme Court having been sought, the District Court had no jurisdiction. Brown v. Chastain, 416 F. 2d 1012 (5th Cir. 1969).

Nothing could be more clear than that petitioner invites the State Court to dispose of the pending litigation adversely to him. Petitioner makes this his position and intent manifest in his Second Amended Answer filed in the District Court of Kerr County, Texas. To be sure, it is sworn pleading, signed and sworn to by both petitioner and his attorney before a Notary Public.

In Randell v. Newark Housing Authority, 384 F. 2d 151 (3rd

Cir. 1967), certiorari denied 383 U.S. 870, 89 S. Ct. 158, 21 L. Ed. 2d 138, at page 156, the Court said:

> A party cannot refuse to make any use of a system of 'administrative,' and 'judicial' relief clearly open to him and thus create a record on which a Federal Court can decide that the party has been denied due process, or that due process safeguards are lacking.

It is pointed out in the Court's note 11 at page 156 of the above cited case that the Court's decision was not based on the rational of exhaustion of state remedies.

The position which petitioner intends to take in the State Court proceeding has been stated by the attorney for petitioner as that of 'laying down and playing dead.' This can hardly be said to contemplate a good faith attempt on petitioner's part to complete the proceedings in the State Court in an adversary manner. The State Court may be embarrassed by such displayed intent which tends to cast the State Court as a secondary, subordinate and inferior tribunal to be paid lip service only and treated as merely a procedural stepping stone to higher, superior and better justice before the courts of the Federal system. The undersigned attorney does not say that this is the overt and conscious intent of petitioner and his attorney, but, nevertheless, it is the effect and the end result. The citizens of the State of Texas have a right to respect and honor both of their court systems.

In Cobb v. City of Malden, 202 F. 2d 701 (1st Cir. 1953) at page 704 the Court said:

> In the instant case, we are confronted with a situation where the enforcement of the federal cause of action against defendant City of Malden clearly contravenes the state policy reflected in the provision of an exclusive remedy for deficiency in appropriations for the public schools. Such enforcement seems neither necessary nor proper in this case. Although a state remedy cannot operate to deprive a federal court of jurisdiction, see Thompson v. Gibbes, D. C., 1945, 60 F. Supp. 872, it may persuade a federal court to

> decline to exercise jurisdiction. A federal court of equity 'may in the public interest, even withhold relief altogether, and it would seem that it is bound to stay its hand in the public interest when it reasonably appears that private right will not suffer.' Securities & Exchange Comm'n v. U. S. Realty & Improvement Co., 1940, 310 U. S. 434, 455, 60 S. Ct. 1044, 1053, 84 L. Ed. 1293. Furthermore, it may, in its discretion, refuse 'to give a remedy which would work a public injury or embarrassment.' United States ex rel. Greathouse v. Dern, 1933, 289 U. S. 352, 360 53 S. Ct. 614, 617, 77 L. Ed. 1250. Since plaintiffs have apparently not even attempted to utilize the available state remedy, and since their injuries may be adequately compensated by recovery in their action against the other named defendants, it is proper for a court to decline to exercise its jurisdiction.

Nowhere, at any time, has petitioner shown, except by the rankest sort of conclusion, that the administrative remedy provided by the State of Texas, which he invoked, is not an adequate remedy.

In Whitner v. Davis, 410 F. 2d 24 (9th Cir. 1969) at page 29, the Court said:

> If the administrative remedy designed to forestall a threatened discharge was adequate, Mrs. Whitner's refusal to make use of it constituted an acceptance of the discharge and prevents her from establishing a claim under the Civil Rights Act.
>
> [Note: On said page 29, at note 5 the Court refers the reader to a comprehensive review of the reasons why litigants should exhaust administrative remedies designed to forestall threatened governmental action as a precedent to resort to courts after the action has occurred in Craycroft v. Ferrall, 9th Cir., 408 F. 2d 587.]

In Craycroft v. Ferrall, 408 F. 2d 587 (9th Cir. 1969) at page 594, the Court reviews reasons why litigants should exhaust administrative remedies as follows:

> Like any other rule, the requirement of exhaustion of administrative remedies prevails whenever the purposes for the rule will be served in the context of a particular case. Among these purposes, all of which generally point to the efficient functioning of our federal legal system, are the following: (1) to avoid excessive encroachment by the judiciary into areas designated by the Constitution or Congress to be within the fundamental responsibility of the legislative or executive branches of the federal government; (2) to avoid interference with the orderly functioning of the administrative process; (3) to discourage a party from 'shopping' for a favorable forum; (4) to relieve the courts of the necessity of deciding constitutional questions or interpreting statutes in matters of public import when recourse to administrative channels might supply relief or moot the controversy; (5) to require administrative completion of a record involving special areas of administrative expertise of complicated or close issues of fact; (6) to avoid advisory opinions and to conserve judicial energies in cases wherein, if action taken at a lower level of the administrative hierarchy is affirmed, the aggrieved party presumably could yet hope for relief by pursuing his administrative appeals.

and at page 593 in the Craycroft Case, id., the Court quoted from Gusik v. Schilder, 340 U. S. 128, 71 S. Ct. 149, 95 L. Ed. 149 (1950) at 132, 71 S. Ct. at 151, the following:

> If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the

> occasion. If it is, any friction between the federal court and the military or state tribunal is saved. That policy is as well served whether the remedy which is available was existent at the time resort was had to the federal courts or was subsequently created***.

In the case of United States v. Bradt, 280 F. Supp. 858, U.S. C.D. Calif. 1968, at page 859 the Court said:

> In this Circuit, exhaustion of administrative remedies is viewed as more than a condition precedent to bringing action; it goes to the very jurisdiction of the court. Hills v. Eisenhart, 156 F. Supp. 902 (N. D. Calif. 1957), aff'd 256 F. 2d 609 (9th Cir. 1958), cert. denied 358 U. S. 832, 79 S. Ct. 53, 3 L. Ed. 2d 70 (1958). The issue being one of subject matter jurisdiction, it may be raised at any time.

Petitioner's complaint was correctly dismissed by the United States District Court because of his avowed intent not to follow in a faithful and effective manner the administrative remedy he voluntarily elected. In the case of Bradford v. School District No. 20, Charleston, South Carolina, 244 F. Supp. 768, D.C.E.D. South Carolina, 1965, affirmed 364 F. 2d 185 (4th Cir. 1966), the plaintiff was suspended or dismissed from his teaching position. Plaintiff failed to follow the administrative procedure required of him under state law, and at page 772 the Court said:

> This court should not interpose and substitute its judgment and authority for that of the local and state authorities unless and until such actions are clearly warranted to safeguard and protect rights guaranteed by the Constitution.

and at page 773 the Court said:

> Plaintiff has an opportunity, indeed the right, to have a full hearing before the County Board of Education, the State Board of Education and the State Courts, any of which bodies can order that he be reinstated in

his teaching position.

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> That controversy, however, would be peculiarly within the jurisdiction of the courts of the State of South Carolina and not this court since there is no diversity of citizenship between plaintiff and defendants. The federal jurisdiction should not be available to every potential litigant who claims to have been wrongfully discharged from his employment, under the guise of the denial of 'due process', where state administrative remedies are adequate to redress his alleged wrongs.

In the case of Bliss v. Shore, 279 F. Supp. 646, D.C.W.D. Pa. 1968, at page 647, the Court said:

> As to the claim for a declaratory judgment...it should not be used to supplant or supersede the time-honored doctrine recognizing the primary jurisdiction of an administrative agency, or requiring adherence to the precise statutory scheme or pattern for obtaining judicial review.

As to the burden on petitioner, the Court at page 713 in the case of Phalke v. Merwin, 161 F. Supp. 710 D.C. Virgin Islands, said:

> The plaintiff, having been accorded an opportunity to know the charges against her before her dismissal and an opportunity to answer thereto, had the burden diligently to assert her rights by appeal to the Commission as authorized....

Failure to exhaust her administrative remedies precluded her from obtaining judicial relief and the Court dismissed her complaint.

In Baron v. O'Sullivan, 258 F. 2d 336 (3rd Cir. 1958), at

page 337 the Court asked and then answered this question:

> May a litigant properly seek the remedy of a federal court under the Civil Rights Act before exhausting the available administrative remedies of the state?

and at page 338 the Court stated its rational as follows:

> Although the usual reason given for the requirement of the exhaustion of administrative remedies is the hesitation of the courts to interfere with state legislative processes, there is a more compelling one, as is apparent here. Appellant alleges a denial of a federally-protected privilege. The decision of the Board of Examiners of Jersey City, reviewable as it is both by the commissioner and the state board, is in a true sense interlocutory. It is merely a tentative determination subject to revision at the discretion of other agencies which are an integral part of the same legislative scheme. We cannot know, therefore, whether the privilege asserted has been denied until the state board has finally made its decision.

It seems obvious what petitioner is intending to do. He initiates the action under the State of Texas administrative procedures and asserts all of his federal claims, then comes to federal court and files suit. Then, he runs back to the State Court and states he now wishes to withdraw from the State Court his federal claims, but will lay down and play dead in the State Court so as to make record to come back to federal court to review the whole matter. And all of this without any showing, except the rankest sort of conclusions of the pleader, that he is entitled to have this Court make a teaching contract for the future and that he has no adequate remedy under the State procedures, wherein at the present time, he is prevailing.

In Brown v. Chastain, 416 F. 2d 1012 (5th Cir. 1969) beginning at page 1013 the Court said:

> As stated in Pilkinton v. Pilkinton, 8 Cir. 1968, 389 F. 2d 32, '[i]t is plainly evident that what appellant seeks in this original action is a review by the federal courts of the proceedings of the ... [Florida] State Courts in the divorce action. Federal courts are without authority to function as an appellate arm of the state courts.' Id. at 33. The decision of a federal constitutional question by a state court does not warrant a mandatory injunction in the nature of mandamus nor an order striking its decision even if erroneous. 'State Courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts.'

In 68 Colum. L. Rev. 1201 (1968), Exhaustion of State Remedies Under the Civil Rights Act, at page 1206 the note has the following to say regarding exhaustion of state administrative remedies:

> Whether to require the exhaustion of state administrative remedies is a more difficult question. A strong state interest is reflected in the establishment of a comprehensive scheme of regulation; authority over the subject matter of the dispute has been vested in an expert supervisory body, far more familiar than a federal court with local factors that legitimately affect administration. Moreover, the states, as well as the federal government have an interest in providing a means whereby official abuse can be corrected without resort to lengthy and costly trial. Thus, the same considerations which support an exhaustion requirement in suits against a federal agency in federal court or a state agency in state court are relevant. In addition, a federal court adjudicating a suit under the Civil Rights Act must consider the

> implications of division of responsibility under a federal system of government. The development of the exhaustion doctrine represented, at least in part, an attempt to minimize intergovernmental friction by deferring to the maximum extent possible to the interest of the states in ordering and regulating their own affairs.

In Burford v. Sun Oil Co., 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), at page 317, 63 S. Ct. at page 1099, the Supreme Court said:

> Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, 'refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest'; for it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.'

In Bonner v. Texas City Independent School District, 305 F. Supp. 600 (D.C. S.D. Tex. 1969) at page 618 the Court said:

> More generally, this Court believes that proper respect for a federal system embracing states which have duties and responsibilities of their own requires federal courts, at the very least, to insist that persons aggrieved by a State's operation of its system of public education exhaust the administrative remedies provided by the State for the correction of abuses. Language in Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed.2d 492 (1961) and McNeese v. Board of Educ., 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963), it is true, suggests that exhaustion of state remedies can never be required in suits brought pursuant to 42 U.S.C. Section 1983. Neither Monroe nor McNeese, however, presented the precise issue

which is now before this Court. Monroe did not involve the State's interest in running its system of public education, and in McNeese, the procedure for review was inadequate. It has been argued that these cases should not, as a matter of policy, be read as precluding courts from requiring the exhaustion of state remedies in appropriate cases. Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 Harv.L.Rev. 1486 (1969). The Court finds that the State's special interest in overseeing the operation of its system of public education makes this an appropriate case for requiring the exhaustion of the remedies made available by state law. In paragraph (3-c) it was noted that the State of Texas has provided a procedure for administrative review of cases like this one, and that plaintiff does not attack the adequacy, availability, fairness, or effectiveness of this procedure. Comity does not allow this Court to permit plaintiff to bypass appropriate administrative procedures. Whether comity also requires a federal court to insist on the exhaustion of state judicial procedures may be left to another case.

Judge Noel in Schwartz v. Galveston Independent School District, 309 F. Supp. 1034 (D.C. S.D. Tex 1970) said, at page 1048:

> Finally, supposing that Section 1983 forbids requiring the exhaustion of any State remedies, it becomes my duty to abstain. Burford v. Sun Oil Co., [319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)] supra. No case, except perhaps Burford itself, could fit more precisely than this one, the tests for abstention there formulated. Involved is a domestic activity of more importance to the State of Texas than the conservation of its mineral resources--the development of its greatest resource, its children.

Judge Spears, in Wood v. Alamo Heights Independent School

District, 308 F. Supp. 551 (D.C.W.D. Tex. 1970) affirmed, 433 F. 2d 355 (5th Cir. 1970), [regulation governing length of hair of students upheld] said at page 554:

> This Court's sentiments were well expressed by Judge Lawrence in the case of Stevenson v. Wheeler County Board of Education, 306 F. Supp. 97 (S.D. Ga. Nov. 17, 1969), when he said:
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> ***
>
> 'Of course, rules cannot be made by authorities for the sake of making them but they should possess considerable leeway in promulgating regulations for the proper conduct of students. Courts should uphold them where there is any rational basis for the questioned rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools.'

Stevenson v. Board of Education of Wheeler County, Georgia, 426 F. 2d 1154 (5th Cir. 1970) involved a civil rights case brought by three male high school students who were suspended from school for refusing to shave. The Court of Appeals held that evidence supported finding that shaving was a part of good grooming, that a failure to shave was a departure from norm which had a diverting influence on student and that the findings and conclusions of fact established that the rule in question was founded on a rational basis.

The Court of Appeals, after reviewing Damico v. California, 389 U.S. 416, 88 S. Ct. 526, 19 L. Ed. 2d 647 (1967), Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), Houghton v. Shafer, 392 U.S. 639, 88 S. Ct. 2119, 20 L. Ed. 2d 1319 (1968), King v. Smith, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 and others, at page 1157 of the Stevenson Case, supra, said:

> We do not take these cases to hold, however, that federal courts are to intervene in school personnel and management problems without requiring such

prior reference to local institutional authority as may be necessary to assure that the action complained of is final within the institutional sense that it is ripe for adjudication. On finality, cf. Scoggin v. Lincoln University, W.D. Mo. 1968, 291 F. Supp. 161, 173 (dictum in student suspension case).2 Cf. also Whitner v. Davis, 9 Cir., 1969, 410 F. 2d 24, 28, American Commuters Assoc. v. Levitt, 2 Cir., 1969, 405 F. 2d 1148, 1150-1151.

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We repeat what the court said in Griffin v. Tatum [425 F. 2d 201 (5th Cir. 1970)], supra:

'This court held in Ferrell v. Dallas Independent School District, 5 Cir., 1968, 392 F.2d 697, that it was proper for school authorities to establish rules and regulations in the interest of school management and this included a hairstyle regulation. We have not denied school authorities in this circuit the right to promulgate reasonable regulations concerning hairstyles. Such regulations and regulations which deal generally with dress and the like are a part of the disciplinary process which is necessary in maintaining a balance as between the rights of individual students and the rights of the whole in the functioning of schools. The touchstone for sustaining such regulations is the demonstration that they are necessary to alleviate interference with the educational process. Ferrell v. Dallas Independent School System, supra, at p. 703. That such regulations may be necessary and, if so, that they may be promulgated and enforced, is also clear from the tenor of Tinker v. Des Moines Community School District, 1969, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731.

In Jeffers v. Yuba City Unified School District, 319 F. Supp. 369 (D.C. E.D. Calif. 1970) the court held that the high school

regulation prohibiting beards among other regulations of hair was reasonable and rationally related to educational process and did not deprive students of their constitutional rights. In the matter of the assertion of right of privacy or personal liberty, the students relied primarily on Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). At page 371 the Court said:

> In reading the opinions of the majority it becomes evident that the only unifying factor is the feeling of all the majority that it was abhorrent to our system of jurisprudence for the legislature to invade the privacy of the marital bedroom and prohibit the right of husband and wife to choose whether they will practice birth control or not.

but regarding the case there before the court, at page 371:

> Here the subject of dispute is the right of students to wear their hair publicly, in a school setting, as they will.

In Freeman v. Gould Special School District of Lincoln County, Arkansas, 405 F. 2d 1153 (8th Cir. 1969) the court held that plaintiff Negro teachers who failed to show any racial discrimination were not entitled to relief under civil rights statutes, and that under Arkansas law giving school board absolute right not to rehire teacher, disagreement between teachers and principal who recommended that they not be rehired was an internal matter to be handled by school board and did not present any federal due process issue.

On speaking on the matter of re-employment of teachers in Arkansas where the school teachers are not covered by any type of civil service or tenure law, the Court at page 1158 said:

> While the school boards in Arkansas have the right to decide whom they are going to employ or re-employ, the basis for failing to re-employ must not be on impermissible constitutional grounds. Smith v. Board

of Education of Morrilton School District No. 32, 365 F. 2d 770 (8 Cir. 1966) (racial discrimination); Johnson v. Branch, 364 F. 2d 177 (4 Cir. 1966) cert. denied 385 U. S. 1003, 87 S. Ct. 706, 17 L. Ed. 2d 542 (racial discrimination); Shelton v. Tucker [364 U. S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960)]....

and at page 1159 the Court said:

> We agree that the teachers are protected under the Equal Protection Clause from discrimination on account of race or religion or in their assertion of constitutionally protected rights, but no case cited by plaintiff has gone so far as to say that all actions of any governmental board or agency in employment cases must accord the individual due process under the Fourteenth Amendment so as to provide tenure and right to retain the position, except for cause. And 'for cause' presupposes a right to hearing, notice, and appeal. Many government employees are under civil service and some under tenure. Absent these security provisions a public employee has no right to continued public employment, except insofar as he may not be dismissed or failed to be rehired for impermissible constitutional reasons, such as race, religion, or the assertion of rights guaranteed by law or the Constitution.

In Hopkins v. Wasson, 227 F. Supp. 278 (D.C. E.D. Tenn. 1962), affirmed 329 F. 2d 67, certiorari denied, 379 U. S. 854, 85 S. Ct. 102, 13 L. Ed. 2d 57, at page 279 the District Court said:

> In her complaint, the plaintiff alleges merely that the defendants failed to rehire her [teacher] at the expiration of the 1959-1960 school year. There is no allegation that the plaintiff's contract was breached or that the obligation thereof was impaired. Upon the contrary, the complaint acknowledges that the

> plaintiff's contract had expired, and further that the plaintiff was not on tenure under the laws of the State of Tennessee. Accordingly, she had no right, statutory or contractural, to be rehired, and nothing in Title 42 U.S.C.A. [Sections] ...1981-1988 entitles her to redress for not being rehired under these circumstances.
>
> Nor does the plaintiff make an adequate claim that the defendants unconstitutionally discriminated against her in failing to renew her contract. In this connection it is well to compare the present case with Brooks v. School District of City of Moberly, 8 Cir., 267 F. 2d 733, where the plaintiffs failed to recover upon an alleged civil rights violation much stronger than that now before the Court.

In Griffin v. Board of Trustees of St. Mary's College, 265 A. 2d 757 (Court of Appeals of Maryland, 1970) at page 759 the court said:

> Griffin concedes that he does not have tenure and that, absent the 'Statement of Policy,' the college had the right to elect not to renew his contract without a hearing and without giving him reasons therefor. His concession is in accord with the weight of authority. See Williams v. School District of Springfield R-12, 447 S. W. 2d 256, 270 (Mo. 1969; Bonner v. Texas City Indep. School District, 305 F. Supp. 600, 618 (S. D. Tex. 1969); and Parker v. Board of Education, 237 F. Supp. 222, 227 (D. Md. 1965), aff'd per curiam, 348 F. 2d 464 (4th Cir. 1965).

In Williams v. School District of Springfield R-12, 447 S. W. 2d 256 (Mo. 1969) at page 262 the court said:

> It is generally stated that a school district has the absolute right to decline to employ or re-employ any applicant or teacher for any reason whatever. 47 Am. Jur., Schools, Sec. 114....Their discretion is broad,

and when such discretion is exercised in good faith and not contrary to law, the courts are loath to interfere to aid anyone whom the board does not desire to employ. However, the basis for failure to re-employ must not be on impermissible constitutional grounds. [Citations omitted.]

and further at page 270 the court said:

> In Parker v. Board of Education of Prince George's County, Md., 237 F. Supp. 222, loc. cit. 228, affirmed 348 F. 2d 464 (4th Cir.), cert. den. 382 U.S. 1030, 86 S.Ct. 653, 15 L.Ed.2d 543, it was stated: 'Generally, in the absence of statute or unreasonable discrimination, a public employee may be summarily discharged from government service, without the necessity of a hearing, and such action does not amount to a denial of due process of law. (Citation following omitted.)

Jones v. Hopper, 410 F. 2d 1323 (10th Cir. 1969, En Banc) cert. denied, 397 U.S. 991, 90 S.Ct. 1111 25 L.Ed.2d 399 (1970) involved an action by a college professor who was not reappointed. The Court of Appeals held that the complaint alleging that, in refusing to appoint the college professor after the term of his employment had expired, college board of trustees denied him a right of expectancy to continued employment because he had sought to exercise his constitutional rights of speech, publication and religion was not sufficient to identify an interest or right secured by Civil Rights Act, in absence of an allegation that conditions of employment were unreasonable or an allegation that board of trustees had gone beyond authority granted to them by Colorado statutes.

On page 1327 the Court said:

> The Supreme Court has consistantly held, 'the interest of a government employee in retaining his job, can be summarily denied. It has become a settled

principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.***This principle was reaffirmed quite recently in Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012.' [Foot Note 12 cites Cafeteria & Rest. Workers Union, Local 473, A.F.L.-C.I.O. v. McElroy, 367 U.S. 886, 896-897, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961)] The foregoing must be read in the light of the principle enunciated in Pickering v. Board of Education [Foot-Note 13 citation, 391 U.S. 563, 568, 88 S.C. 1731, 20 L.Ed.2d 811 (1968)], which quotes Keyishian v. Board of Regents [Foot Note 14 citation, 385 U.S. 589, 605, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967)].

and on page 1328 the Court says:

'It is clear that a professor is not an officer, but an employee under contract to fill a chair of learning.' [Foot Note 17 cites State Board of Agriculture v. Meyers, 20 Colo. App. 139, 77 P. 372, 373 (1904). See also 75 A.L.R. 1352 (1955). 'The courts are almost unanimous in holding that the position of a teacher is that of an employee, resting on the contract of employment, and not that of public officer.']

*****

The alleged interest deprived was in the appointment for a third year. It is admitted he did not have a tenure privilege either by Colorado law or contract.

*****

Southern Colorado State College is a state academic institution organized and existing under Colorado law which vests the government and management of its affairs in a board of trustees which has among other vestitures 'power to appoint and remove all

subordinate officers, professors, teachers, assistants, employees or agents, in, or about, or concerning said college, to appoint or employ, discharge and suspend, contract and fail to renew contracts of employees and other subordinates.***'

His claimed interest must find its source in his expired appointment which constituted whatever contract existed....

and the court goes on to say at page 1329:

The provision specifically denies an expectancy to continued employment; therefore, absent an expectancy, there could be no interest. [Foot Note 19 cites Freeman v. Gould Special School Dist. 405 F.2d 1153, 1158 (8th Cir. 1969); Cobb v. Howard University, 70 App. D.C. 339, 106 F.2d 860, cert. denied, 308 U.S. 611, 60 S.Ct. 175, 84 L.Ed. 510 (1939)] 'One has no constitutional right to a 'remedy' against the lawful conduct of another.' [Foot Note 20 cites Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S.Ct. 857, 864, 81 L.Ed. 1229 (1937)].

As demonstrated above the right, privilege or immunity Jones alleges he was deprived of is non-existant.

*****

" 'Will the interests of an institution of learning be promoted by dispensing with the services of a particular professor?' And yet if we assume that the statute of the state is of any virtue, it is just such a question that the plaintiff in error sought to have determined in the Circuit Court. It is a question which, in our opinion, the Legislature intended to commit to the sound judgment of the regents who are selected because of an especial fitness for the performance of such duties, and who, by their

experience and their intimate familiarity with the institution, are qualified to exercise that discretion in a far sounder manner than any court or jury could be qualified by evidence adduced through witnesses. It is elementary that no cause of action can arise from the lawful exercise of a statutory power in the absence of an express provision conferring it. It is also a principle of law as securely founded that an exercise of a power by an administrative board or officer to whose judgment and discretion it is committed is not a proper subject of review by the courts when fraud or conditions equivalent thereto do not exist." [Foot Note 22 cites Ward v. Board of Regents, 138 F. 372, 377 (8th Cir. 1905)].

"It would be intolerable for the courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to impose such a requirement would be an interference with the operation of institutions of higher learning contrary to established principles of law and to the best traditions of education." [Foot Note 23 cites Greene v. Howard University, 271 F. Supp. 609, 615 (D.D.C. 1967)].

The primary thrust of petitioner's reasons for granting the writ are set forth on page 9 of his Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit where the petitioner says:

The order of dismissal entered by the District Court and sanctioned by the Court of Appeals directly conflicts with this Court's rulings in Monroe v. Pape, 365 U.S. 167 (1961); McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967); and with the recent holdings of the Fifth Circuit in Moreno v. Henckel,

431 F.2d 1299 (5th Cir. 1970) and Rainey v. Jackson State College, 435 F. 2d 1031 (5th Cir. 1970).

Justice Clark was one of the three Circuit Judges hearing this case in the Court of Appeals for the Fifth Circuit. See pages A-1 and A-2 of Appendix A of petitioner's petition for writ of certiorari.

It seems inconceivable that a Circuit Judge of the caliber of Justice Clark could have forgotten, on December 17, 1970 and on May 4, 1971, his written opinion of August 10, 1970 in the case of Sindermann v. Perry, 430 F. 2d 939 (5th Cir. 1970) involving a suit by Professor Sindermann against the Board of Regents of Odessa Junior College alleging that the action of the regents in refusing to offer the professor a new term of employment was based solely on his exercise of First and Fourteenth Amendment rights, expression, etc. Writing for the Court, Justice Clark said on page 940:

> Shortly after the summary judgment was appealed, this court decided Pred v. Bd. of Public Instructions, 415 F. 2d 851 (5th Cir. 1969), which classifies the rights of persons, circumstanced such as plaintiff as constitutional rather than contractural. Pred aligned this court with the 4th Circuit [Foot Note 1 cites Johnson v. Branch, 364 F. 2d 177 (4th Cir. en banc, 1966), cert. denied 385 U.S. 1003, 87 S.Ct. 706, 17 L.Ed.2d 542 (1967)] and against the 10th Circuit [Foot Note 2 cites Jones v. Hopper, 410 F.2d 1323 (10th Cir. en banc, 1969), cert. denied 397 U.S. 991, 90 S.Ct. 1111, 25 L.Ed.2d 399 (1970)] in this as yet unresolved conflict between circuits.

and Justice Clark writing for the court said on page 942:

> Pred v. Bd. of Public Instruction, supra, invalidates the basic legal premise of the [District] Court's summary judgment [finding the contract rights of the parties clear the District Court entered summary judgment against the professor]. There we said:

'Equally unpersuasive is the related argument that since there is no constitutional right to public employment, school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for a violation of any rights protected by Sec. 1983. But in the posture of this case this misconceives the whole thrust of their claim. The right sought to be vindicated is not a contractural one, nor could it be since no right to reemployment existed. What is at stake is the vindication of constitutional rights---the right not to be punished by the State or to suffer retaliation of its hand because a public employee persists in the exercise of First Amendment rights.' (415 F.2d at 856).

Speaking through Justice Clark, on pages 943-945, the Court sets out very elaborate standards for Academic Hearing Procedures.

Justice Clark also wrote for the Court in Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). The District Court had denied relief to Dr. Ferguson after a plenary trial of his claim that the defendant officials of Prairie View A&M College terminated his employment as an instructor. Finding no violation of any right cognizable by the court below as to the termination of his employment, the 5th Circuit Court of Appeals affirmed the District Court's final judgment insofar as it dismissed that claim. At the threshold the court sought to determine Dr. Ferguson's legal relationship to the college, and on page 855 the Court said:

It is admitted that he was employed for a limited period of time, that that time period expired and no new contract for subsequent employment was tendered to him. It is also admitted that he had no tenure, and thus no right to additional employment. Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969). But a college can create an obligation as between itself and an instructor where none might otherwise exist under the legal standards for the interpretation of contract relationships regularly applied to transactions in the marketplace if it adopts

regulations or standards of practice governing non-tenure employees which create an expectation of reemployment. Greene v. Howard University, 134 U.S. App. D.C. 81; 412 F.2d 1128 (1969).

In the Ferguson Case, supra, the defendant college consistantly treated their action in Dr. Ferguson's case as a termination of his employment rather than a decision not to offer him a new or subsequent term of employment and the prevailing practice of such college was that a decision not to offer such an instructor a renewal contract of employment required a showing of cause.

Respondent has shown no such expectancy and there is no showing that there has ever been a practice of showing cause where there is a decision by School District not to offer a new contract.

And on page 857 of the Ferguson Case, supra, the Court goes on to say:

> The substance of due process requires that no instructor who has an expectancy of continued employment be deprived of that expectancy by mere ceremonial compliance with procedural due process. While he has no right to continued public employment, such a teacher may neither be dismissed or not be rehired for constitutional impermissible reasons such as race, religion, or the assertion of rights guaranteed by law or the Constitution. This rationale would even apply to a teacher without tenure or an expectancy of reemployment. Pred v. Board of Public Instruction, supra; Johnson v. Branch, 364 F. 2d 177 (4th Cir. En Banc, 1966), cert. den. 385 U.S. 1003, 87 S.Ct. 706, 17 L.Ed.2d 542 (1967); Freeman v. Gould Special School District, supra; contra, Jones v. Hopper, 410 F.2d 1323 (10th Cir. En Banc, 1969), cert. den. 397 U.S. 991, 90 S.Ct. 1111, 25 L.Ed.2d 399 (1970).

After having set the principles of law and standards of

academic due process controling in the Court of Appeals for the Fifth Circuit, the court then applied the facts thereto resulting in the following statement at page 859 of the Ferguson Case, supra;

> Here the proof before the district court shows that Dr. Ferguson exercised his rights of speech and association to such an extent as to seriously impair, if not to destroy, his effectiveness as an instructor in an organized program of academic tutoring. This was his choice to make. The college had no right to control his speech or to curtail his freedom of association, but they did have a right to terminate his employment as a classroom instructor at the point where the exercise of his constitutional privileges clearly over- balanced his usefulness as an instructor.

In this case now before this Honorable Court it is respectfully submitted by the School District that petitioner has wholly failed to demonstrate that he has any Federally protected right which has been violated. The school regulation in question is not unreasonable and it is not irrational, but on the contrary, it is reasonably related to the successful and proper conduct of the educational process in the schools of said school district. Such rule is reasonably related to discipline and decorum within said School District as well as being reasonably related to cause no disruption, disturbance or distraction in the educational process. The regulation in question has for its purpose the maintenance of an effective and efficient school, the same being the furtherance of good educational practices and the maintenance of classroom order and school decorum. Further, said rule had for its purpose and as a part of its basis the educational responsibility of such School District to provide reasonable guidance and example and standards of appearance and decorum as an educational matter.

The efficient operation of an educational institution by its very nature requires discipline and good order to accomplish its educational purpose. Every educational institution must establish and require the observance of standards of conduct for

its personnel, administration, faculty and students. Based on such considerations the School District's regulation in question is reasonable and predicated upon a proper educational purpose. Petitioner's wearing of the beard prior to the time he was suspended from teaching in the classroom and subsequent thereto caused disruptions, disturbances and distractions in the educational process within the School District. The School District's enforcement of the regulation is directly related to the vital interests of education and no Federally protected right of petitioner has been violated.

Petitioner would have this Honorable Court believe that the Court of Appeals for the Fifth Circuit ignored its own opinions and decisions. It is difficult to conceive that the 5th Circuit Court of Appeals in less than three months could have forgotten the case of Thaw v. Board of Public Instriction of Dade County, Florida, 432 F.2d 98 (5th Cir. 1970) where at page 99 the court said:

> The authority in this Circuit requires school boards to provide notice and hearing before dismissing a public school teacher or college professor in either of two types of cases. The first type is that of a school teacher who has 'tenure' or a reasonable expectation of reemployment. Ferguson v. Thomas, 5th Cir. 1970, 430 F.2d 852. A public school teacher falling into this category may not be dismissed unless the school board first affords him a hearing at which the reasons for his termination are stated and the teacher is given an opportunity to refute the charges against him. This basic requirement protects the public school teacher who has been led to expect that he will be reemployed from being arbitrarily dismissed.
>
> The second type of case in which a school board has been required to provide a hearing is that of a school teacher who has no tenure or expectancy of reemployment, but who asserts that he has been dismissed for constitutionally impermissible reasons, either solely because of race or religion, or because he has attempted to exercise his first amendment rights.

Pred v. Board of Public Instruction, 5th Cir. 1969, 415 F. 2d 851.

> The school teacher in the instant case falls into neither of these categories. He offers no proof of any reasonable expectation of reemployment under the Florida statute, and he clearly has no tenure. ....As a matter of fact, appellant is in exactly the same position as the school teacher in Pred, supra....We expressly stated in that case that under such circumstances no right to reemployment exists. The right protected in Pred was rather a constitutional right, and this is the critical distinction between that case and ours.

In the Thaw Case, supra, the Court held that the county board of public instruction would not be required to grant a hearing to teacher who had no tenure or any reasonable expectation of reemployment or renewal of his contract where there was no assertion that the teacher had been dismissed for constitutionally impermissible reasons.

Another case which petitioner would have this Honorable Court believe the Court of Appeals for the Fifth Circuit ignored is the case of Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970) where at page 947 the court said:

> Lucas [schoolteacher] had no tenure and his one-year contract was not breached. But his long employment in a continuing relationship through the use of renewals of short-term contracts was sufficient to give him the necessary expectancy of reemployment that constituted a protectible interest. [Citations ommitted.]
>
> *****
>
> Our holding should not be misunderstood. In this instance [Lucas Case, supra] we know from the District Court hearing that the asserted reason for

termination involved a possible collision with Lucas' First Amendment rights. A hearing was mandatory, if desired by Lucas. But where the only matter in issue is a difference of view over a school board's exercise of judgment and discretion concerning matters non-constitutional in nature, the board is not required to conduct a hearing. Freeman v. Gould Special School District, 405 F. 2d 1153, 1161 (8th Cir. 1969) [Foot Note 2 reads 'Of course, we speak here of the teacher who has neither contract nor tenure provisions independently providing for discharge only for cause]. There are in-between situations which are somewhat more difficult. If the board asserts a non-constitutional reason and the teacher claims it is a sham and that the real reason is one impinging on his constitutional rights, he must be afforded a hearing. Also, even in the area of non-constitutional reasons, the board's decision must not be wholly unsupported by evidence else it would be so arbitrary as to be a constitutional violation. [Citations omitted].

In this case now before this Honorable Court, it is undisputed that petitioner has no tenure. He so admits in his petition for writ of certiorari at pages 10-11.

The Court of Appeals for the Fifth Circuit had before it the statement of facts and transcript from the hearing before the District Court, and, as in the Lucas Case, supra, the Fifth Circuit knew exactly what the assertions of petitioner were and are, and there can be no mistake about this.

The above synopsis of events set forth in the statement of facts clearly demonstrates that petitioner knew the reasons for his termination and he was afforded ample hearings. It is respectfully submitted that the School District fully complied with all of the more strict rules and principles of law of the Court of Appeals for the Fifth Circuit as required under the authorities of such Circuit, the same being Ferguson v. Thomas, supra; Pred v. Board of Public Instruction, supra; Sindermann v. Perry, supra; and Lucas v. Chapman, supra, and as required under the rule of Johnson v. Branch, supra, of the Fourth

Circuit, as distinguished from the holding of the Jones v. Hopper Case, supra, of the 10th Circuit.

As mentioned above, petitioner, on page 9 of his petition for certiorari, states that the Fifth Circuit Court of Appeals ignored holdings of this Honorable Court and holdings of the Fifth Circuit, and throughout his petition he goes into great length about the remedy underlying the Civil Rights Act being supplementary to any state remedy and asserting that the Court of Appeals for the Fifth Circuit required petitioner to exhaust state remedies.

Nothing could be more clear as to the position of the Court of Appeals for the Fifth Circuit than its statement on page 436 in the case of Hall v. Garson, 430 F. 2d 430 (5th Cir. 1970) where the Court said:

> This Court routinely rejects the cry that it is necessary to exhaust state remedies. See Orr v. Thorpe, 5th Cir., 1970, 427 F.2d 1129. And we here again reject it.

And this was said after the Court had cited Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967); Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319 (1968) and Exhaustion of State Remedies Under the Civil Rights Act, 68 Colum. L. Rev. 1201 (1968).

Foot Note 11, at page 436 of the Hall v. Garson Case, supra, seems quite important and should not be overlooked. It reads as follows:

> There can be no doubt that until Monroe, McNeese, Damico and Houghton the conventional wisdom was that the exhaustion of state administrative remedies was required while there was no need to exhaust judicial remedies. C. Wright, supra....[Federal Courts, Section] 49 (2d Ed. 1970). Here, of course, only judicial remedies are involved. It may be that

> exhaustion of administrative remedies is still required at least to the extent that it is necessary to have an authoritative institutional decision or pronouncement. Thus it might be necessary to require a school student to seek school board review of a principal's action. Stevenson v. Bd. of Education of Wheeler County, 5 Cir. 1970, 426 F.2d 1154.

and on pages 436-437 the Fifth Circuit Court makes its position on the abstention doctrine very clear.

If there is any question about the position of the Fifth Circuit Court remaining, then attention is directed to the statement of such Court on page 1300 in the case of Moreno v. Henckel, 431 F.2d 1299 (5th Cir. 1970) where the Court said:

> The district court not only abstained, but dismissed the complaint on the ground that a remedy was available to the plaintiffs in the Texas courts. That is not the law. 'The fact that a state remedy is available is not a valid basis for federal court abstention.' (Citation omitted.)

And the Fifth Circuit Court goes on to state on page 1305 that:

> If there is one thing certain about the legislative history of the [Civil Rights] Act, it is that Congress, open-eyed, deliberately set out to alter the so-called 'delicate balance' between the state and the federal government so that federal courts could effectively protect federal rights.

And further, on page 1309 the Court writes:

> Mr. Justice Harlan, in a concurring opinion in Zwickler [v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967)] has pointed out that the Supreme Court has approved abstention in situations when 'the federal constitutional issue might be mooted or presented in a different posture by a state court determination of pertinent state law,' or 'in

situations in which the exercise of jurisdiction by a federal court would disrupt a state administrative process; interfere with the collection of state taxes, or otherwise create 'needless friction' between the enforcement of state and federal policies.' 389 U.S. at 455, 456, 88 S.Ct. at 400. The present situation [Moreno v. Henckel, supra, involving a discharged municipal employee] is within none of these categories. There are no pending administrative proceedings to disrupt. There are no legal proceedings or about to be brought in the state courts.

In this case now before this Honorable Court, the record clearly shows that there is now pending in the state court an administrative proceeding, which said administrative proceeding was initiated by petitioner and which administrative proceeding has been halted or put in the refrigerator, so to speak, by the petitioner himself, although he is at this point in the proceeding prevailing.

Again, respondents would point out to this Honorable Court that petitioner has not demonstrated that he has any Federally protected right which has been violated.

Slightly over one month before the Court of Appeals for the Fifth Circuit handed down its first decision (see page A-1 of the Appendix A in petitioner's petition for writ of certiorari), the said Court handed down its decision in Wood v. Alamo Heights Independent School District, 433 F.2d 355 (5th Cir. 1970). At page 355, the Court said:

> This is another haircut case. The recent decisions of this court have pointed to the necessity that before the federal courts intervene in cases such as this there must be 'such prior reference to local institutional authority as may be necessary to assure that the action complained of is final within the institution in the sense that it is ripe for adjudication.' Stevenson v. Bd. of Education of Wheeler County, 426 F.2d 1154 [student grooming regulations]; cf. Lucas v. Chapman, 430 F.2d 945 [1970] (failure to renew teacher contract). The District Court entered its

opinion and judgment in this case prior to those decisions, therefore, we reach the merits instead of remanding to the local authorities.

And as to the merits of the case the court, on page 356, said:

> The District Court did not err in its conclusion that the regulation in question is not arbitrary or unreasonable and that it is sufficiently related to alleviating interference with the educational process. Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir.), cert. denied, 393 U.S. 856, 89 S.Ct. 98, 21 L.Ed.2d 125 (1968); Davis v. Firment, 408 F.2d 1085 (5th Cir. 1969); Stevenson v. Wheeler County Bd. of Education, supra; Griffin v. Tatum, 425 F.2d 201 [1970].

The Texas Education Code, Section 23.26, in part reads as follows:

(b) The trustees shall have the exclusive power to manage and govern the public free schools of the district.

(d) The trustees may adopt such rules, regulations, and by-laws as they deem proper.

In the case of Wilson v. Abilene Independent School District, 190 S.W.2d 406 (Tex. Civ. App. 1945, error ref'd want of merit) at page 412 the Court said:

> It will be seen that the grant of power and authority to school boards is in general terms. The Legislature could not possibly foresee all problems and situations that would arise in the administration of the schools.....But, necessarily; school boards are given a wide discretion in such matters. They may make all such rules and regulations as in their judgment are necessary to maintain an 'efficient' system of schools, subject to the limitation that there be no abuse of discretion, and that such regulations be not arbitrary,

unreasonable or in violation of law.

Jackson v. Dorrier, 424 F. 2d 213 (6th Cir. 1970) which involved an action to enjoin enforcement of a school regulation which prohibited male students from wearing long hair, on page 217, quoted from Tinker v. Des Moines School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) where the Supreme Court said:

> The problem posed by the present case does not relate to regulations of the length of skirts or the type of clothing, to hair style, or deportment. C.f. Ferrell v. Dallas Independent School District, 5 Cir. 392 F.2d 697.***393 U.S. 507-508, 89 S.Ct. 737.

and on page 218-219 the Court said:

> In Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228, the Supreme Court said:
>
> 'Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.*** By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.'
>
> In Tinker v. Des Moines Independent Community School District, supra, the Court said:
>
> '[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.' 393 U.S. at 507, 89 S.Ct. at 737.

> In the absence of infringement of constitutional rights the responsibility for maintaining proper standards of decorum and discipline and a wholesome academic environment at Donelson High School is not vested in the federal courts, but in the principal and faculty of the school and the Metropolitan Board of Education of Nashville and Davidson County, Tennessee.
>
> We follow Ferrell v. Dallas Independent School District, supra, in holding that the District Court committed no error in dismissing the present case.

In a proceeding on application to Mr. Justice Black, as Circuit Justice, Mr. Justice Black, in Karr v. Schmidt, _____ U.S. _____, 91 S. Ct. 592, _____ L.Ed.2d _____ (1971) denied the application to vacate stay of injunction pending appeal, thus not forbidding school authorities to enforce their local rule requiring public school students not to wear hair hanging over their collars or obstructing their visions pending appeal from an order enjoining enforcement of the rule. At page 542, it was said:

> I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the States. And I furthermore refuse to predict that our Court will hold they have such power. It is true that we have held that this Court does have power under the Fourteenth Amendment to bar state public schools from discriminating against Negro students on account of their race, but we did so by virtue of a direct, positive command in the Fourteenth Amendment, which, like the other Civil War Amendments, was primarily designed to outlaw racial discrimination by the States. There is no such direct, positive command about local school rules with reference to the length of hair state school students

must have. And I cannot now predict this Court will hold that the more or less vague terms of either the Due Process or Equal Protection Clauses have robbed the States of their traditionally recognized power to run their school system in accordance with their own best judgment as to the appropriate length of hair for students.

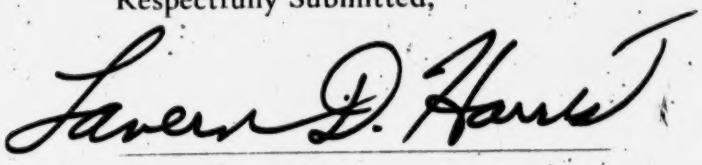
*****

Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of in which States are more capable of deciding than the length of the hair of school boys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 states. Perhaps if the courts will leave the states free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear.

CONCLUSION

From the foregoing statement of the facts and authorities, the respondents (School District) pray and request this Honorable Court to in all things deny the petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and for such other and further relief that respondents (School District) may be entitled.

Respectfully Submitted,



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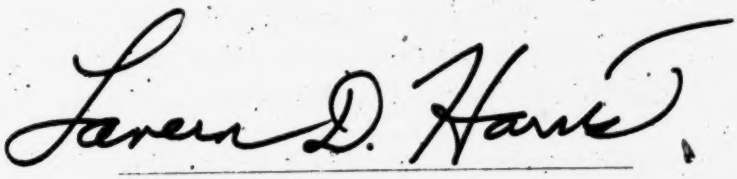
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify that before mailing the foregoing instrument, Respondents' Brief in Opposition to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, for filing, that I personally mailed to Joe Mike Egan, Jr., 401 Junction Highway, Kerrville, Texas 78028, counsel for petitioner, three copies thereof in accordance with Rule 33 of the Rules of the Supreme Court, on the 22nd day of June, 1971.



Lavern D. Harris

APPENDIX A

STATE OF TEXAS	*	RE: GENE BALL
COUNTY OF TRAVIS	*	VS.
BEFORE THE	*	BOARD OF TRUSTEES OF
COMMISSIONER OF	*	KERRVILLE INDEPENDENT
EDUCATION	*	SCHOOL DISTRICT
		(KERR COUNTY), TEXAS

STATEMENT OF CASE

Gene Ball, appellant, had taught mathematics for six consecutive years prior to 1969-70 school year in the Tivy High School of the Kerrville Independent School District. He signed a contract to teach in the same assignment during 1969-70.

On the morning of Friday, August 29, 1969 he reported for duty wearing for the first time during his tenure a Van Dyke style beard. He attended then the orientation and building faculty meetings, after which he was notified by the high school principal to report to the superintendent.

The superintendent asked appellant to shave his beard before reporting to teach on Tuesday. Appellant declined to do so. The superintendent advised him that he should consider himself suspended until he did so.

On the first day of classes (Tuesday, September 2, 1969) appellant presented himself for duty wearing his beard, was advised by the principal that he was still under suspension, and was told to see the superintendent. Again the superintendent requested appellant to shave his beard and appellant declined again to do so.

By letter dated September 2, 1969, the superintendent formally notified appellant, in substance:

1. that appellant was suspended;

2. that a recommendation would be presented to the board of trustees requesting termination of appellant's contract;

3. that such recommendation could be averted if appellant would shave his beard; and

4. that appellant had a right to appeal the superintendent's action to the board.

A special meeting of the board, six members attending, was held on September 3, 1969 to consider the recommended termination of appellant's contract. Appellant was invited to attend with counsel. Appellant declined to appear but reserved the right to be heard on the board's decision.

The board voted (6-0) at such meeting to terminate appellant's contract. Appellant filed timely request for local hearing of his appeal. Subsequently, the board was presented with a petition bearing 194 names asking the board to reconsider appellant's contract termination.

On September 15, 1969, the board held an open meeting to hear appellant's appeal and to give reconsideration to its action terminating appellant's contract. A decision was delayed for further study.

On September 23, 1969, the board met in special session, reaffirmed its action of September 3, terminating appellant's contract, and approved payment of salary to appellant for the month of September only.

From such action appellant timely appealed to me. His appeal was heard by me on November 19, 1969 when all parties were present and represented by their respective counsel.

Appellee board contends herein that the superintendent's directive- request requiring appellant to shave his beard was reasonable, and that it was necessary to maintain and conduct proper discipline of scholastics at Tivy High School under the following circumstances and fact situation:

1. Appellant developed his beard during the summer months of 1969. Before the school term began, several citizens requested the superintendent and principal not to permit appellant to wear his beard in school classes. Five parents asked that their children not be assigned to appellant's classes if he persisted in being bearded.

2. The district's established policy prohibiting its students from wearing beards would be more and increasingly difficult to enforce if faculty members were privileged to wear beards. Thus appellant's beard would be disruptive to the well being or orderly operation of the high school. Testimony presented at the hearing before me by the principal was that more students than ever before had to be sent home at the beginning of this school year to shave their beards. This, he testified, was a result of the knowledge these students had of appellant's beard.

3. Appellant's beard was disturbing and disruptive to members of the faculty, all of whom were present at the August 29 orientation meetings. It was also in violation of the general rule of the school requiring that all members of the faculty use decorum in their dress and in their grooming.

4. Appellant's refusal to remove his beard at the request of the superintendent, predicated upon the above cited circumstances, constituted a lack of cooperation, insubordination, and a violation of the terms and spirit of his contract.

Appellant contends primarily that his election to wear a beard while employed by the district is protected as a constitutionally protected form of expression under the speech provisions of the First Amendment to the United States Constitution.

Appellant readily admits that Constitutional freedoms are not absolute but he maintains that they can be limited only where a compelling need can be demonstrated to offset the freedom.

He urges herein that such a need would have to be based on

more than a mere anticipation of harm or disruptive activities which could result from his wearing a beard; that there would have to be past experience to support the need and the anticipation of harm; and that the application of professional judgment would not suffice to abridge his freedom unless it is supported by evidence of past harm.

In furtherance of this primary contention, appellant presented as argument that:

1. There has been no bearded teacher in modern history in the district.

2. The district had no past experience of harm resulting from teachers having worn a beard. There was no compelling need existing on August 29, or September 2, 1969 to prohibit teachers from wearing a beard.

3. The superintendent's rule requiring appellant to shave his beard was wholly anticipatory. As such, it constituted a perspective judgment entirely unsupported by past experience of harm. It therefore was unconstitutional.

4. The board's action in supporting, as it did, the superintendent's rule and in dismissing appellant is therefore unconstitutional and appellant is constitutionally protected from its enforcement.

As a secondary contention, appellant argues that appellee board and administration have no formal policy and no rule which specifies that teachers be clean shaven. He was not therefore in violation of district policy.

DECISION

The facts are clear that the district had no written policy prohibiting beards. Some testimony was given to the effect that there was a long standing unwritten policy requiring decorum in dress which, the district urged construed, would prohibit beards. Such testimony, however, is not conclusive.

The superintendent's contention that teachers as professional people should not have their dress regulated by specific rules falls short in view of the fact that appellant was fired for violating a specific rule or request.

The basis for the discharge action herein, therefore, must be found in the general authority of the district to govern, operate and control in the affairs of the district, and under the terms of appellant's contract which requires appellant to be governed by reasonable rules made by the superintendent of schools (among others).

The question here is whether or not the rule laid down by the superintendent on August 29, 1969 that appellant must remove his beard as a condition to his being permitted to perform as a teacher under his contract was a reasonable and necessary rule at that time to ensure and preserve a normal and orderly operation of the school in the current school term.

The superintendent at that time had these facts to consider:

1. Problems about the beard were arising before school started as evidenced by protests from parents and other citizens made prior to the opening of school against appellant's beard. These included requests from five parents that their children not be assigned to appellant's classes so long as he wore a beard.

2. The district's established policy requiring all students to be clean shaven and the effect appellant's beard might have on the ability of the district to enforce such policy.

3. The immediate effect of appellant, who was conversant with student policy, appearing before the students wearing a beard. For the prior six years he had been exemplary as a faculty member in following the policy required of his students.

In addition to the above facts, the superintendent also was acutely aware and had to consider on August 29, 1969 the increasing number of student protest cases in the high schools of the state and the likelihood of student protests developing at

Tivy High School during the fall of 1969 from any unexpected deviation from its heretofore normal operations. He had to consider and did on August 29, 1969, whether or not the appearance of a bearded faculty member for the first time might be interpreted by students as a symbol of discrimination against their own rights and privileges.

In my best judgment and opinion, the actions of the superintendent and the board in requiring appellant to shave his beard as a condition of his continued employment, in light of the facts then before them, were reasonable and necessary. Appellant should voluntarily have been willing to comply with the superintendent's requests made on August 29, 1969, motivated and intended for the best interests of the school district, before he was told by the superintendent that he was being suspended.

Furthermore, I am not persuaded or convinced that appellant, at such time, was committed to a beard as essential to his personality, or as an integral part of his grooming. He had experimented with cultivating a beard in at least one previous summer, and on his own initiative, had voluntarily shaved it before school began.

He testified that growing or retention of his beard was not intended in any way to be a test of school policy. Whether or not he so intended, it was in fact considered by many citizens to be a test, as evidenced by public reaction created in protest against it and in support of it.

Undoubtedly, appellant was aware and knew of this reaction. As a professional teacher, acquainted and experienced with the disciplines and problems of school operations, he could, and should have taken such action prior to the opening of school to remove himself as a faculty member from being the cause of unnecessary controversy–whether it be cultivating a beard or some other act on his part. Such is my opinion as one engaged in public school administration.

Accordingly, I cannot support appellant in his action. It is my decision therefore, that I should and hereby do respectfully decline to overrule the final action of the Board of Trustees of Kerrville Independent School District taken on September 23, 1969.

Given under my hand and seal of office this 11th day of December, A.D., 1969.

/s/ J. W. Edgar
J. W. Edgar
Commissioner of Education